BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TAMERA K. BARKER	)	
Claimant	)	
VS.	)	
	)	Docket No. 247,134
GRACE, UNRUH & PRATT and	)	
LAW OFFICES OF BRIAN G. GRACE	)	
Respondents	)	
AND	)	
	)	
CONTINENTAL WESTERN INSURANCE	)	
HAWKEYE SECURITY INSURANCE	)	
TRAVELERS CASUALTY INSURANCE	)	
KEMPER INSURANCE	)	
Insurance Carriers	)	

ORDER

Respondent, Law Offices of Brian G. Grace and Travelers Casualty Insurance request review of the December 2, 2011 Award by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on March 16, 2012, in Wichita, Kansas.

APPEARANCES

James B. Zongker, of Wichita, Kansas, appeared for the claimant. William L. Townsley, III, of Wichita, Kansas, appeared for respondent Law Offices of Brian G. Grace (Grace) and Travelers Casualty Insurance. Matthew J. Schaefer, of Wichita, Kansas, appeared for respondent Grace, Unruh & Pratt and Kemper Insurance. Kendall R. Cunningham, of Wichita, Kansas, appeared for respondent Grace, Unruh & Pratt (law office) and Hawkeye Security Insurance. Kirby A. Vernon, of Wichita, Kansas, appeared for respondent Grace, Unruh & Pratt and Continental Western Insurance.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument to the Board, the parties stipulated that the transcript of the

preliminary hearing held on September 28, 2004, with exhibits is part of the record and may be considered in this matter. Additionally, the issue of whether claimant provided respondent with timely notice was no longer before the Board for it's consideration. Likewise, the issues dealing with whether respondent and Travelers were properly made parties to this action and whether timely written claim had been provided were no longer in dispute. The parties further agreed that claimant has an average weekly wage of $1,025.67.

ISSUES

The ALJ found claimant met with personal injury by a series of accidents, arising out of and in the course of her employment and found the date of accident to be July 31, 2008, the last day claimant worked for the Law Offices of Brian G. Grace (Grace). The ALJ adopted the opinions of Drs. Koprivica and Murati and found claimant had a 93.5 percent permanent partial general (work) disability. The liability for the Award was placed solely against the Law Offices of Brian G. Grace and its insurance Carrier, Travelers Casualty.

Respondent, Grace and Travelers Casualty argue the main issue is a determination of the date of accident and whether claimant's injuries arose out of and in the course of her employment with Grace. Grace and Travelers argue that the ALJ's Award should be reversed and Grace, Unruh and Pratt (law firm) and its insurance carriers be held responsible for claimant's compensation, as claimant's condition did not worsen after she left the law office. Therefore, the date of accident should be the last day claimant worked for the law office.

Kemper argues that the ALJ's Award should be affirmed as the credible evidence establishes that claimant continued to suffer microtraumas or aggravations each day she worked through her last day of work and therefore under the "last injurious exposure" rule Travelers bears liability to provide claimant workers compensation benefits.

Hawkeye Security Insurance (One Beacon) argues that the ALJ's Award should be affirmed. In the alternative, One Beacon argues that the case should have two dates of accident, one while claimant was working with Grace, Unruh & Pratt and one while she was working with Law Offices of Brian G. Grace. Therefore, the functional impairment should be assessed against Grace, Unruh & Pratt and the work disability assessed against Law Offices of Brian G. Grace in accordance with where claimant was working at the time of the two dates of accidents. Each insurance carrier would be responsible for the medical expenses incurred during their coverage periods and the carrier for Law Offices of Brian G. Grace would be liable for any future medical expenses. However, One Beacon does raise an issue regarding the amount of temporary total disability compensation (TTD) paid in this matter. At the pre-hearing settlement conference with the ALJ, One Beacon reported that it had paid $23,474.32 (58.54 weeks at $401.00 per week) in TTD benefits to claimant. Both claimant and One Beacon, in their submission letters to the ALJ, acknowledge that

this amount was paid. The notes of the ALJ from the settlement conference list TTD benefits as being paid by One Beacon in the amount of $23,474,32. However, the Award states that no TTD was paid.

Continental Western Insurance argues the Award should be affirmed. Continental contends that the claimant's injury occurred each and every working day until her employment with Law Offices of Brian G. Grace terminated, therefore the date of accident should be claimant's last day of work, July 31, 2008.

Claimant relied on her submission brief presented to the ALJ, which argues she should be entitled to a 77 percent work disability against Grace and Travelers. However, in light of the award, claimant would argue that the Award of a 93.50 percent work disability should be affirmed.

At the regular hearing on April 21, 2008, the parties stipulated that claimant had a functional whole person impairment of 23 percent. This impairment represented a compromise between a 20 percent and a 43 percent whole body functional impairment. The parties also agreed that the 23 percent figure constituted a $35,000.00 payout. The attorney for the claimant announced that the date of accident ran from July 1999 through March 2008. All parties present agreed to the stipulation, with Travelers noting that the payment was to be split equally between Continental Western Insurance and Kemper Insurance. Additionally, Travelers, with coverage from March 1, 2005 through claimant's last day worked with the Law Offices of Brian Grace, continued to deny all stipulations as they relate to its coverage period. However, Travelers stated that it did not oppose the parties' stipulation to a settlement based on a split of the ratings at a 23 percent whole body functional impairment. The agreement included a finding that $35,000.00 represented the liability amount, with Continental Western and Kemper sharing responsibility for the settlement amount. With the exception of Travelers, all insurance coverage for the various companies ended in March 2005. This agreement was never formalized by an Order. However, the stipulations from the regular hearing were never formally withdrawn.

THE ISSUES ARE:

1. Did claimant prove that she met with injury or injuries on a date or dates of accident as alleged against either or both respondents? If so, what are the date or dates of accident in this matter?
2. Did claimant's injuries arise out of and in the course of her employment with either or both respondents?
3. What is the nature and extent of claimant's injuries and/or disabilities, including pre-existing impairment?
4. What is the effect of the stipulations of the parties?
5. What are the amounts of medical and TTD benefits due, both before and after the date or dates of accident in this matter?

FINDINGS OF FACT

Claimant worked for Grace, Unruh & Pratt as a senior legal assistant for 13 years and was assigned to attorney Brian G. Grace. Claimant asserted a workers compensation claim against the law firm in 1996, ultimately undergoing surgery to her left upper extremity. Claimant testified that she had nerve conduction tests on her left and right upper extremities. This matter, assigned to docket number 213,494, also involved complaints to her shoulders and neck.[1] This claim was ultimately settled on a running award on December 15, 1998, and claimant continued to work for the law firm.

Claimant testified that in July 1999 she began to develop problems with her right arm and elbow. She immediately reported those problems to Mr. Grace. She was provided medical attention with a multitude of health care providers and continued to work for the firm. Claimant testified that her work, putting together and taking apart heavy notebooks along with shelving the notebooks and typing, caused her pain. She made Mr. Grace aware of this.

Brian G. Grace, when he was an attorney for respondent, Grace, Unruh & Pratt, testified that claimant had been working for him for 17 years.[2] He testified that since claimant's second surgery her emotional state became worse because the procedure had not been successful. Claimant began having crying fits from the constant pain.[3] Mr. Grace testified that claimant complained of pain in both arms, hands and neck. It got to the point they didn't even talk about it anymore. It was suggested that she see a psychiatrist or psychologist. Mr. Grace called in a favor and got claimant evaluated in January 2004 by Dr. Paul Murphy, who diagnosed claimant with major depressive disorder and neuropathic pain in her upper extremities.

Claimant came under the care of board certified orthopedic surgeon, George L. Lucas, M.D., on or around February 7, 2000. She reported tingling in her right little finger after using the computer for several hours. Dr. Lucas returned claimant on April 24, 2000, to regular duty. Claimant's return to work status did not change at claimant's May 25, 2000 visit. By August 10, 2000, claimant was having problems straightening her elbows. She indicated these problems were from spending 14-15 hours per day getting ready for a trial and having to handle huge notebooks. Dr. Lucas diagnosed claimant with lateral epicondylitis and medial epicondylitis. Claimant continued to work for the firm during this time. Her complaints continued for several more months and although she had some improvement in her pain, by November 2000, she had trouble straightening her right elbow. At this time, Dr. Lucas decided that surgery was claimant's best option. On December 5,

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[1] P.H. Trans. (Mar. 6, 2001) at 11-12.

[2] P.H. Trans. (Oct. 2, 2003) at 6.

[3] P.H. Trans. (Oct. 2, 2003) at 6.

2000, Dr. Lucas recommended claimant have surgery for radial tunnel syndrome and lateral epicondylitis.

As claimant continued to work, she began to have other physical problems with her right arm. She complained of an ache and burn in her arm, along with numbness in her fingers. Claimant testified that this was different from the problems she had before. Claimant reported her new symptoms to Mr. Grace and was referred for medical treatment. Claimant had no increase in her left arm symptoms. In April and December 2001, claimant had surgery on her right arm with Dr. Lucas. After the surgeries, claimant went back to work under restrictions. Claimant was told not to do any typing or filing, although she did admit to doing some typing. Even this small amount of typing caused claimant pain.

The surgery was unsuccessful in alleviating her pain. Claimant testified that she had bilateral pain in her fingertips, up past her elbows into her biceps, up the back of her neck and into the back of her head.[4] This pain made it hard for claimant to sleep and left her emotionally unstable. Claimant testified that her pain was around a 5 out of 10 and could get as high as 8 out of 10. Claimant testified that her emotional problems started when she realized she was not going to get any better.[5] After her arm surgeries in 2001, claimant developed discomfort in her neck, cervical spine and shoulders and required treatment. At some point, claimant was sent to Dr. Ng for chronic pain management. NCT/EMG studies were determined to be normal at that time. Claimant was also referred to Dr. Lies, for a rheumatology consultation. The impression was myofascial pain syndrome and repetitive stress syndrome. When claimant was examined by Dr. Lucas on April 3, 2003, she was determined to be at a plateau of healing. She was rated at 24 percent impairment to the upper extremities which converts to 14 percent to the whole person impairment, for right and left ulnar nerve compression syndrome.

Claimant began seeing Dr. Jon Parks for pain management on January 6, 2004. Claimant associated her neck pain and discomfort with her work activity and having to type eight hours straight to prepare for a trial. She testified that there were many times she had to do things she probably shouldn't, but in a law office there was always a little emergency or last minute task that needed to get done. Claimant testified that she takes a lot of pain medication. She went to Dr. Parks for trigger point injections in her neck.

Claimant attributes her increase in pain to a progression of her symptoms over the years and not to a specific accident.

In December 2005, respondent Grace, Unruh & Pratt dissolved their law practice and Brian G. Grace started a solo practice. Claimant went with Mr. Grace and her job

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[4] P.H. Trans. (Oct. 2, 2003) at 11.

[5] P.H. Trans. (Oct. 2, 2003) at 13.

became more physical. She began to hurt everyday. Claimant's employment with Mr. Grace ended on July 31, 2008, after Mr. Grace retired and closed his practice. Claimant testified that while working for Mr. Grace's solo practice, her condition got worse because she was the only one performing all of the office duties. Claimant reported this to Mr. Grace.[6] After Mr. Grace retired, while claimant was not working, her pain subsided somewhat. But, while she was working for Mr. Grace the intensity of her pain complaints increased.[7] She continued to have pain in her right elbow that radiated into her right wrist and pain in her neck that radiated into the back of her head, bilateral collarbone pain, left elbow pain and bilateral shoulder pain.

Claimant obtained employment as a paralegal with the law firm Martin, Pringle, Oliver, Wallace & Bauer (Martin, Pringle) and began working there on November 10, 2008. She didn't expect for her work for this firm to be much different from what she did for Mr. Grace. While working for Martin, Pringle, claimant's myofascial pain was exacerbated in the upper back and around the scapula and she had shooting pain in her arms.[8] She also experienced headaches and muscle tightness. She did not have any new symptoms when she returned to work. But the pain levels increased.

Claimant's job at Martin, Pringle required that she learn about corporate law and she had to adjust to the new type of work. She performed work for several attorneys in the firm. Claimant acknowledged that she didn't inform Martin, Pringle that she had filed a workers compensation claim until after she started working for the firm.

Melissa Richardson, human resource manager for Martin, Pringle, testified that claimant worked for the firm as a paralegal beginning November 10, 2008. Claimant was hired as a full-time hourly employee, making $20.84 an hour. Ms. Richardson was not aware of claimant's work restrictions related to a workers compensation claim at the time of her hire. Claimant's employment was terminated on April 28, 2009, due to poor performance in completing her assignments. Claimant applied for and began drawing unemployment.

Claimant's average weekly wage while working for Martin, Pringle in November and December 2008 was $624.35. Claimant's average weekly wage while working for Martin, Pringle from January - April 2009 was $982.19.

Claimant was referred by her attorney to Dr. Pedro Murati, for an evaluation on December 11, 1997, related to a work accident on April 1, 1996, while employed as a paralegal for Grace, Unruh and Pratt. He noted that at the time he diagnosed status post

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[6] Cont. R.H. Trans. by Depo. (Oct. 22, 2008) at 6-7.

[7] Cont. R.H. Trans. by Depo. (Oct. 22, 2008) at 7-8.

[8] Cont. R.H. Trans. by Depo. (Nov. 20, 2008) at 11-12.

left ulnar cubital syndrome, right ulnar cubital syndrome, cervical and bilateral shoulder strains with myofascial pain component and right de Quervain's. He recommended she get an ergonomic keyboard and only do repetitive hand controls no more than 20 minutes at a time and occasional repetitive gripping, and rated her with a 20 percent whole person impairment.[9]

Claimant met with Dr. Pedro Murati for another examination on October 5, 1998, with complaints of right shoulder pain, right sided neck pain, pain in both elbows, pins and needles feeling in both little fingers, aching of both wrists and a bump over the left wrist.

Dr. Murati diagnosed claimant status post left ulnar cubital decompression, possible right ulnar cubital syndrome, cervical strain and bilateral shoulder strains. He recommend claimant continue with the permanent restrictions he gave in December 1997 and assigned a 12 percent whole person impairment.[10]

Claimant saw Dr. Murati for another examination on May 14, 2003, with complaints of pain in her right and left elbows. Claimant was examined and diagnosed with right elbow pain secondary to status post radial nerve decompression x's 2 and a lateral epicondylar release and left lateral epicondylitis. Dr. Murati opined that the diagnoses were, within reasonable medical probability, a re-aggravation of claimant's pre-existing condition in July 1999 during her employment with Grace, Unruh & Pratt. He assigned a 19 percent whole person impairment and restrictions.[11]

Claimant was seen again on September 2, 2004, with complaints of right arm pain at the place of her incision, neck pain that goes up towards the head down to the shoulder blade on both sides, and right shoulder pain. She was examined and diagnosed with myofascial pain affecting bilateral shoulders, neck and thoracic paraspinals with signs and symptoms of cervical radiculopathy, right elbow pain status post unknown surgeries, and left lateral epicondylitis.

Dr. Murati opined that the diagnoses were within reasonable medical probability a direct result of claimant's work-related injury in July 1999 during her employment with Grace, Unruh & Pratt. He assigned a separate 19 percent whole person impairment and restrictions.[12] Dr. Murati testified that the combined ratings of 2003 and 2004, would be

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[9] Murati Depo. (Nov. 24, 2008), Ex. 7 (Dr. Murati's Dec. 11, 1997 report).

[10] Murati Depo. (Nov. 24, 2008), Ex. 9 (Dr.Murati's Oct. 5, 1998 report).

[11] Murati Depo. (Nov. 24, 2008), Ex. 5 (Dr. Murati's May 14, 2003 report).

[12] Murati Depo. (Nov. 24, 2008), Ex. 8 (Dr. Murati's Sept. 2, 2004 report).

34 percent, pursuant to the AMA Guides, 4th ed. He did not provide a rating for the bilateral elbow pain because he didn't have the operative report.[13]

Claimant was seen for another examination on August 3, 2006, with complaints of right elbow pain radiating into the right wrist; pain in the neck radiating into the back of the head; pain in the bilateral collar bone area; left elbow pain; pain in both shoulder blades, worse on the right than the left; both hands easily fatigued, and occasional swelling in the incision site of the left wrist.

Dr. Murati diagnosed claimant with right carpal tunnel syndrome, myofascial pain syndrome affecting the bilateral shoulder girdles and extending into the thoracic and cervical paraspinals, status post multiple unknown surgeries, right elbow, status post bilateral lateral epicondylectomy, cervical radiculopathy, left radial nerve entrapment and status post left ulnar nerve decompression, pre-existing.

Dr. Murati opined that his diagnoses were the direct result of claimant's work-related injury on July 1, 1999 while working for Grace, Unruh & Pratt. He assigned a 43 percent whole person impairment and permanent restrictions. He also opined that claimant was going to need to have the battery for her spinal cord stimulator replaced every two years as long as she has the stimulator in place.[14]

Claimant had another evaluation with Dr. Murati on October 13, 2008, with complaints of a burning sensation in both shoulder, numbness in both arms and hands, a stabbing pain in the back of her neck going up into the back of her head, pain in both shoulder blades, and pain in both elbows and both wrists.

Dr. Murati diagnosed right carpal tunnel syndrome; myofascial pain syndrome affecting the bilateral shoulder girdles extending into the cervical and thoracic paraspinals; status post bilateral lateral epicondylectomy, cervical radiculopathy, left radial nerve entrapment; status post radial nerve decompression x 2; and status post left ulnar nerve decompression, pre-existing. Claimant was instructed to work as tolerated and to use common sense.

Dr. Murati opined that his diagnoses were the direct result of claimant's work-related injuries on July 1, 1999 and each working day after for Grace, Unruh & Pratt. He assigned a 45 percent whole person impairment.[15]

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[13] Murati Depo. (Nov. 24, 2008) at 36.

[14] Murati Depo. (Nov. 24, 2008), Ex. 4

[15] Murati Depo. (Nov. 24, 2008), Ex. 2.

Dr. Murati opined that over the several times he has seen the claimant, she has progressively gotten worse. He attributes the worsening to claimant's inability to follow the imposed restrictions.[16] He felt claimant's ongoing work caused and aggravated claimant's conditions. Claimant's problem was the repetitive nature of her work.[17] Anything repetitive that claimant did between 2003 and 2006 led to the increase in her impairment.

Dr. Murati was provided the task list prepared by vocational expert Jerry Hardin. Of the 25 tasks on the list, 18 are non-duplicative tasks. Of those 18, Dr. Murati indicated that claimant could no longer perform 10, which calculates to a task loss of 56 percent.

At the request of respondent and Travelers, claimant met with Dr. John McMaster for an examination on July 24, 2009. Her main complaints at the time were pain in the back of her head and pain in her shoulders, neck, shoulder blades, and arms. Dr. McMaster reviewed claimant's medical records and performed an examination, ultimately diagnosing chronic cervical and upper extremity pain disorder; somatization disorder, non-occupational; bipolar affective disorder, non-occupational and tobacco use disorder.[18]

Claimant told Dr. McMaster of a work-related injury that began on or about July 1, 1999, involving the right elbow and an ulnar nerve problem in the left arm.

Dr. McMaster opined that despite the significant amount of medical records and his objective findings, he was unable to verify within a reasonable degree of medical certainty any specific diagnosis or aggravation of any preexisting diagnosis as a result of the occupational tasks performed between March 1, 2005 and July 31, 2008. In addition he was unable to verify that any interval aggravation of pre-existing impairments reported by other health care providers occurred as a direct or indirect result of the occupational tasks performed between March 1, 2005 and July 31, 2008.[19]

Dr. McMaster did not assign claimant a permanent impairment despite finding claimant at maximum medical improvement because he did not feel that claimant's work after March 1, 2005, caused her additional functional impairment.[20] He also did not feel that claimant suffered any kind of task loss during the period when she worked for The Law Office of Brian G. Grace.[21]

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[16] Murati Depo. (Nov. 24, 2008) at 25.

[17] Murati Depo. (Apr. 15, 2009) at 22.

[18] McMaster Depo. (Aug. 11, 2009), Ex. 2 at 11.

[19] McMaster Depo. (Aug. 11, 2009), Ex. 2 at 11.

[20] McMaster Depo. (Aug. 11, 2009), Ex. 2 at 13.

[21] McMaster Depo. at 17.

Dr. McMaster testified that a minor irritation to one person could be a major disabling injury to another person. He opined that, based upon the 4th edition of the AMA *Guides*, claimant has no impairment involving her shoulders, elbows, wrists, hips, knees or ankles.[22]

Dr. McMaster acknowledged that claimant told him she performed the same work duties for both law firms. However, they didn't discuss the duration, frequency or intensity of the tasks when she worked for both firms.[23] Despite claimant having a nerve stimulator and being unemployed the last time Dr. McMaster met with her, he did not consider claimant to ever be pain-free.

> Q. And from your discussion of the issue of causation, am I to assume that whatever physical activity she engaged in from March of '05 until her employment ended, you did not feel that those were sufficient to cause additional impairment of function?
>
> A. You are correct.
>
> Q. And am I also to assume that it was your understanding that the activities that she was doing from March of '05 until her employment ended was essentially the same activity that she had been doing for several years before?
>
> A. Yes.[24]

At the request of respondent and Continental Western Insurance, claimant met Dr. P. Brent Koprivica for an examination, on October 7, 2009. Dr. Koprivica was asked to evaluate claimant regarding the repetitive injuries she sustained out of and in the course of her employment as a legal assistant, and more specifically the exposure to risk beginning in March 2005, and each and every working day through July 2008, while working for the Law Offices of Brian G. Grace.

Claimant's complaints at that time were severe pain in the back of her head, pain down both sides of her neck, pain in both shoulders and shoulder blades, pain in both arms and pain in both elbows and hands.

Dr. Koprivica opined that due to claimant's increase in physical demand when she went to work for Mr. Grace, she had an increased exposure to risk.[25] This risk was further

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[22] McMaster Depo. at 32.

[23] McMaster Depo. at 34.

[24] McMaster Depo. at 39-40.

[25] Koprivica Depo., Ex. 2 at 4 (Dr. Koprivica's Oct. 7, 2009 IME report).

increased when she became the only employee of Grace from November 2007 until July 2008. Dr. Koprivica noted that claimant hadn't been substantially employed since April of 2009.

Dr. Koprivica noted that claimant's medical records indicated that she had a fall at home on September 11, 2007, and received injections a month later. Claimant had another fall on January 4, 2008.[26]

Upon examination, Dr. Koprivica opined that claimant has some psychological issues and concluded claimant's underlying physical condition was permanently aggravated, accelerated and intensified as a result of her work activities while working for the Law Offices of Brian G. Grace beginning March 2005 and each and every working day through July 2008. He opined that during this employment, claimant was exposed to the same types of risks that predated March 2005, but that the risk was greater with her increased responsibilities. He further opined that any future need for medical treatment is due to claimant's work for the Law Offices of Brian G. Grace.

Dr. Koprivica did not provide an impairment rating, stating that it was not an issue he was looking at. He was asked to determine causation.[27] Dr. Koprivica testified that, in his opinion, claimant's employment in the law offices resulted in a permanent aggravation, acceleration and intensification of multiple repetitive trauma injuries involving her neck, shoulder and upper extremities. And her activities with Grace from March 2005 through July 2008 resulted in further permanent aggravation, acceleration, and intensification of those conditions. He testified that claimant's risk was greater after March 2005, when her work load increased.[28]

He was not asked to do a task analysis and did not provide restrictions, but testified that he would have claimant reduce the frequency and duration of her repetitive type activities and overhead work.

By Order dated October 9, 2003, board certified anesthesiologist Jon C. Parks, M.D., was appointed as claimant's authorized treating physician for pain management. Dr. Parks provided claimant with chronic pain management for several years. On January 6, 2004, during claimant's first visit, Dr. Parks and his staff came to the conclusion that she was in need of additional trigger point injections and pain management. Claimant was diagnosed with chronic myofascial pain in the cervical area, trapezius, bilaterally, right infraspinatus and right sternocleidomastoid. She also had chronic right arm pain from post radial nerve and lateral epicondylar releases with continued numbness and tingling; chronic

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[26] Koprivica Depo., Ex. 2 at 18-19 (Dr. Koprivica's Oct. 7, 2009 IME report).

[27] Koprivica Depo. at 13.

[28] Koprivica Depo. at 14-15.

left arm pain with lateral and medial epicondylitis; status post ulnar nerve release, and depression. The goal with claimant's prior treatment was to improve claimant's pain in her upper extremities.

Claimant was administered trigger point injections and was prescribed Neurontin, Percocet, Ultram, Gabitril and Protonix for her complaints. Later, claimant's treatment included Zanaflex and Effexor along with multiple trigger point injections over a several month period. Dr. Parks recommended a repeat MRI, but it was refused by the insurance company. He noted that claimant's frustration with the system was causing her overall situation to worsen.

A court ordered MRI was administered in September 2004, which displayed disk bulges at C3-4, C4-5, C5-6 and C6-7 with impingement on the thecal sac at C5-4 and minimally at C3-4, and degenerative changes in the cervical spine. An epidural steroid injection was recommended at C5-6. This was performed on December 16, 2004.

By February 8, 2005, claimant's symptoms had spread to the C7-T1 region and claimant was provided a C7-T1 nerve root block on March 15, 2005. Lortab and Cymbalta were added to claimant's prescription list. Another nerve root block was administered on April 15, 2005. Claimant reported some benefit from this injection. A third injection was administered on May 9, 2005 with no benefit. The nerve root block was then administered at the C5-6 level on June 13, 2005, with left side improvement. A C5-6 nerve root block was again administered at C5-6 on June 30, 2005, with no benefit. By September 2005, claimant was being scheduled for repeat nerve root blocks at multiple levels.

At the October 27, 2005 exam claimant was advised that if the blocks did not help, a spinal cord stimulator should be considered. When conservative treatment failed to help claimant, a spinal cord stimulator was implanted on a trial basis on December 14, 2005, and permanently installed on February 1, 2006. It reduced her discomfort. By March 2007, Dr. Parks began administering trigger point injections for myofascial pain in claimant's neck and upper back. Claimant reported at the April 12, 2007 examination, which may have moved the stimulator lead may have been moved. The position of the lead was corrected and claimant reported benefit with her pain.

Through the remainder of 2007 and 2008, claimant continued receiving injections and remained on her pain medication. By November 2008, her medications included Protonix, Prilosec, Lithium Carbonate, Seroquel, Percocet, Zanaflex and Trileptal. Plus, she continued with the spinal cord stimulator and was receiving periodic trigger point injections in her neck and shoulders.

Dr. Parks' notes indicate that in November 2008, claimant reported that her myofascial pain was exacerbated in the upper back around the scapula after she started working for Martin, Pringle. However, at the June 24, 2009 examination, claimant reported

increased spasm with tightness in her neck and upper back, even after being terminated from Martin, Pringle. He considered claimant's condition to be chronic.

Dr. Parks testified that during his treatment of the claimant from March 1, 2005 to July 31, 2008, while claimant worked for Mr. Grace, he found no uniquely separated identifiable anatomic injury or new problem related to her work.[29] He noted that claimant's main problems were in both upper extremities and the neck. He acknowledged that claimant's ongoing work duties were further aggravating her condition.

Claimant was referred by her attorney to vocational expert Jerry Hardin for a task loss analysis. Mr. Hardin's task list was then provided to Dr. Murati as above indicated. Dr. Murati determined which of the tasks on the list claimant could continue to perform. Of the 18 non-duplicative tasks on the list, Dr. Murati indicated claimant was unable to perform 10. This calculates to a task loss of 56 percent.

The task list prepared by vocational expert Steven L. Benjamin was presented to respondent's medical expert, Dr. McMaster. After reviewing the list, Dr. McMaster determined that claimant had suffered no loss of her task performing ability.

Claimant remained unemployed until November 10, 2008, at which time she began working for Martin, Pringle as a paralegal. Claimant acknowledged that the work with Martin, Pringle caused her additional pain in her arms. Her employment with Martin, Pringle was terminated on April 28, 2009. She was told that she wasn't performing her job to their satisfaction. Claimant applied for and began receiving unemployment. While working for Martin, Pringle claimant was paid $20.84 per hour and worked full time. Her average weekly wage for November and December 2008, was $624.35. Her average weekly wage for the period from January 1, 2009 through April 28, 2009 was $982.19.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[30]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[31]

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[29] Parks Depo. at 28.

[30] K.S.A. 44-501 and K.S.A. 44-508(g).

[31] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[32]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[33]

Claimant has spent the majority of her life as a legal assistant for either the law firm of Grace, Unruh & Pratt or for the Law Firm of Brian G. Grace. Beginning in 1999, claimant began developing upper extremity problems, which later resulted in multiple surgeries. Claimant's injuries did not develop as the result of a specific trauma. They occurred over a lengthy period of time as a series of micro-traumas which slowly caused claimant's body to break. This matter is complicated by the fact that claimant left the law firm and went to work for Brian G. Grace when the firm split up. Claimant has alleged microtraumas while working for both the law firm and for Grace. To make matters more complicated, the law firm contracted with three insurance companies for workers compensation coverage during claimant's employment at the law firm. Plus, a fourth insurance company then began providing workers compensation coverage to Grace when the law firm split up in 2005.

Claimant filed an earlier claim against the law firm alleging bilateral upper extremity cubital tunnel syndrome injuries as well as myofascial pain in the cervical, thoracic and parascapular regions. That matter was assigned docket number 213,494 and settled by Agreed Award on December 15, 1998 based upon a 9.5 percent whole body permanent partial disability with stipulated dates of accident on April 1, 1996 and every working day through June 3, 1996 and from May, 1996 through April 28, 1998. It was recommended that claimant limit her physical activities after that settlement. However, claimant's job duties wouldn't allow for such limited physical activity. As a result, claimant developed additional upper extremity injuries and difficulties while continuing to work for the law firm. Claimant sought additional medical treatment and was examined and/or treated by a

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[32] K.S.A. 44-501(a).

[33] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

multitude of health care providers. During this entire time she continued performing the regular job tasks of her legal assistant position.

As noted above, the parties stipulated at the regular hearing that claimant had a 23 percent whole body permanent partial impairment from her work with the law firm. While Travelers agreed that it did not oppose the agreement, it also did not agree to participate in the stipulation. But, as noted above, Travelers coverage did not begin until claimant left the law firm, and then it only provided coverage for Grace from that time forward. The evidence in this record supports a finding that claimant suffered a series of trauma's while working for the law firm.

When dealing with a series of injuries which occur microscopically over a period of time, the Kansas appellate courts have established a bright line rule for identifying the date of injury in a repetitive, microtrauma situation. The date of injury for repetitive injuries in Kansas has been determined to be either the last day worked or the last day before the claimant's job is substantially changed.[34]

The Board finds that claimant suffered personal injury by accident through a series of microtraumas through her last day worked with the law firm. The Board will honor the stipulation of the parties from the regular hearing and find that claimant suffered a 23 percent whole person functional impairment as the result of her injuries with the law firm through her last day worked there. However, that stipulation is not binding on Travelers for the subsequent series at Grace.

Claimant contends that she suffered additional injuries after leaving the law firm and going to work for Grace. Claimant's last day with Grace was on July 31, 2008 when the Law Firm of Brian Grace closed with the retirement of Mr. Grace. Dr. McMaster opined that claimant suffered no injury or aggravation of any pre-existing condition as the result of her ongoing work with Grace through her last day. Yet, he agreed that claimant was never pain free during this time. Both Dr. Murati and Dr. Koprivica found claimant's problems to have been aggravated during her employment with Grace. Dr. Koprivica noted that claimant's work for Grace exposed her to an increased risk of injury, primarily due to the increase in work load when claimant began performing all of the office work by herself.

Dr. Murati, time and again, testified that claimant's work injuries and problems related back to July 1, 1999, when claimant was working for the law firm. However, he also noted that claimant's physical condition continued to worsen during the time he examined and treated her in 2006, 2007 and 2008. He opined that claimant's ongoing work caused an aggravation of her physical conditions. It was the repetitive nature of claimant's work

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[34] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999); *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003); this rule was changed when the amended version of K.S.A. 44-508(d) became law on July 1, 2005.

that caused the worsening and subsequent increase in her functional impairment. On August 3, 2006, claimant's whole body functional impairment had increased to 43 percent. By the time Dr. Murati examined claimant on October 13, 2008, her whole body functional impairment had increased to 45 percent. This proves to the Board that claimant's employment with Grace caused a worsening of her physical injuries above and beyond the injuries suffered while working for the law firm.

K.S.A. 2010 Supp. 44-508(d) states:

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[35]

The determination of the second date of accident in this matter while claimant worked for Grace, is difficult. K.S.A. 44-508 was amended on July 1, 2005. This eliminated the last day worked date of accident bright line rule in *Treaster*. Dr. Parks was claimant's authorized treating physician effective October 9, 2003, and continuing for several years as he provided pain management for claimant's ongoing symptoms. During this time claimant was provided a plethora of pain medications, numerous nerve root blocks and trigger point injections for her pain and a spinal cord stimulator also to help with the pain. It does not appear that claimant was provided specific work restrictions while working for Grace, with the exception that she work as tolerated. It is acknowledged that clamant was provided work restrictions when working for the law firm. Those restrictions were known to the law firm. Also, Grace knew about the restrictions. But, claimant didn't adhere to them while working for Grace due to the limited support staff in that office. Respondent and Travelers acknowledge that claimant was provided no additional work restrictions while she worked for Grace. But she still had those prior restrictions and after going to work for Grace, it appears that she continued performing her regular job through her last day worked. From this record, it appears that the first two criteria for determining claimant's second date of accident under K.S.A. 2005 Supp. 44-508(f) have not been met. Additionally, while there are numerous medical reports connecting claimant's physical

[35] K.S.A. 2010 Supp. 44-508(d).

problems to her job duties, there is no indication when or if any of these writings were ever presented to claimant.

On June 8, 2007, claimant filed an E-1 with the Division, alleging dates of injury including July 1, 1999 through July 27, 1999 and February 15, 2005 through a series on June 6, 2007 and continuing thereafter, and listing both the law firm and Grace as the employer. Under K.S.A. 2005 Supp. 44-508(f), this appears to be the statutorily created date of accident. The ALJ's finding of a single date of accident on July 31, 2008, is modified to find a date of accident for the series through June 8, 2007.

K.S.A. 2000 Furse 44-510e states:

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[36]

The Board must next determine the nature and extent of claimant's injuries and disability while working for Grace. As noted above, the Board has determined that claimant suffered a 23 percent whole person impairment while working for the law firm. However, claimant argues that her physical impairment was worsened by her labors with Grace. Respondent and Travelers argue that the opinion of Dr. McMaster that claimant suffered no worsening of her condition while working for Grace is the most credible. Claimant contends the opinions of Dr. Murati and Koprivica that claimant's condition worsened while with Grace should carry more weight. Dr. Parks, claimant's long-term authorized treating physician provided no impairment opinion. Yet, he did provide claimant with a multitude of treatment regimens over a several year period. The Board finds the opinions of Dr. Murati and Dr. Koprivica that claimant's condition worsened while working for Grace to be the most credible and persuasive. When Dr. Murati examined claimant on October 13, 2008, he assessed claimant a 45 percent whole person functional impairment pursuant to the AMA Guides, 4th ed. The ALJ found, and the Board agrees, that claimant suffered a permanent partial whole person functional impairment of 45 percent while working for Grace.

K.S.A. 2000 Furse 44-510e also states:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was

[36] K.S.A. 2000 Furse 44-510e(a).

> earning at the time of the injury and the average weekly wage the worker is earning after the injury.[37]

There are only two task loss opinions in this record. Dr. McMaster determined that claimant had no task loss. Dr. Murati's opinion was calculated at a task loss of 56 percent once the duplicate tasks were eliminated. The Board finds the opinion of Dr. Murati carries the most weight in this matter and adopts same.

After claimant lost her job with Grace, she was unemployed until being hired by Martin, Pringle, on November 10, 2008. For the period from August 1, 2008 through November 9, 2008, claimant had a 100 percent wage loss. From November 10, 2008 through December 31, 2008, claimant had a wage loss of 39 percent when comparing claimant's average weekly wage of $1,025.67 with her wage at Martin, Pringle of $624.35. This calculates to a permanent partial general (work) disability of 47.5 percent. For the period from January 1, 2009 through April 28, 2009, claimant was earning $982.19, which is at least 90 percent of her average weekly wage on the date of accident. (See K.S.A. 2008 Supp. 44-510e(a)). Therefore, for that time period, claimant suffered no work disability. After claimant was laid off from Martin, Pringle her wage loss became 100 percent and the work disability would be 78 percent from that point forward.

K.S.A. 2010 Supp. 44-501(c) states:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.[38]

This record supports a finding that claimant had a pre-existing functional impairment at the time she began working for Grace. Dr. Murati had rated claimant on several occasions prior to March 2005. On May 14, 2003, claimant was rated at 19 percent to the whole person for bilateral lateral epicondylitis. When Dr. Murati examined claimant on September 2, 2004, he rated her at 19 percent to the whole person for myofascial pain in her shoulders, neck and thoracic paraspinals. He did not again rate claimant for the bilateral elbow pain. These two ratings combine for a 34 percent whole person functional impairment. The Board acknowledges that it had earlier accepted the parties stipulation of a 23 percent whole person functional impairment while claimant worked for the law firm. However, that functional impairment was the result of a compromise by the parties for the purposes of the award for the first series of accidents. That is not a true reflection of the functional impairment that actually pre-existed claimant's employment with Grace. The Board finds that claimant suffered a 34 percent whole person functional impairment which

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[37] K.S.A. 2000 Furse 44-510e.

[38] K.S.A. 2010 Supp. 44-501(c).

pre-existed her employment with Grace. Because Travelers was not a party to the stipulation, it cannot be binding upon Travelers. Pursuant to K.S.A. 44-501(c) the permanent partial general (work) disability award resulting from the time claimant worked for Grace will be reduced by a 34 percent whole person functional impairment.

There is information in this record to indicate a possible third series of accidental injuries while claimant worked for Martin, Pringle. This is not being claimed, and as there is no medical support for an aggravation of claimant's injuries while working for Martin, Pringle, this issue has not been addressed by the Board. Neither respondent argued that claimant suffered an intervening accident or injury after her employment at Grace ended.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds that the Award should be modified to find that claimant suffered a series of injuries through her last day worked with the Law Firm of Grace, Unruh & Pratt, on February 28, 2005. The Award of the ALJ is modified to award claimant a 23 percent permanent partial whole person functional impairment for the time claimant worked with the law firm. The Board will utilize 58.54 weeks of TTD paid claimant by respondent and Kemper (Old Beacon) in calculating this award. Pursuant to the stipulation of the parties, this will be calculated at $35,000.00.

The Board further finds that claimant suffered a second series of accidents while working for The Law Offices of Brian G. Grace with a date of accident on June 8, 2007. Claimant is awarded a permanent partial whole person functional impairment of 45 percent for the time she worked for Grace, minus claimant's pre-existing whole person functional impairment of 34 percent.

Thereafter, effective August 1, 2008, through November 9, 2008, claimant is awarded a permanent partial general disability award of 78 percent, followed by a work disability of 39 percent for the period from November 10, 2008 through December 31, 2008, followed by no additional work disability for the period from January 1, 2009 through April 28, 2009, followed by a permanent partial general disability of 78 percent effective April 29, 2009. Any disability compensation awarded claimant from and after July 31, 2008, will be reduced by claimant's pre-existing 34 percent whole person functional impairment.

The Award of the ALJ regarding the previously ordered medical bills, current medical expenses, unauthorized medical expenses, if any and future medical treatment is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated December 2, 2011, should be, and hereby,

is modified to award claimant a 23 percent permanent partial whole body functional impairment for a series of injuries through her last day worked for the law firm of Grace Unruh & Pratt on February 28, 2005.

Claimant is entitled to 58.54 weeks of TTD at the rate of $401.00 per week, totaling $23,474.54, followed by 85.44 weeks of permanent partial whole body functional disability at the rate of $401.00 per week, totaling $35,000.00, for a total award of $58,474.54. As of the date of this award, the total amount is due and owing and ordered paid in one lump sum, minus any amounts previously paid. This permanent disability award will be shared equally between respondent's insurance carriers, Continental Western Insurance and Kemper Insurance.

Thereafter claimant is awarded a permanent partial whole person functional impairment of 45 percent for the time she worked for Grace. This calculates to 186.75 weeks of permanent partial whole person impairment at the weekly rate of $529.00 totaling $98,790.75, all of which is due and owing and ordered paid in one lump sum, minus any amounts previously paid. This award, with a date of accident of June 8, 2007, is assessed entirely against respondent Grace and it's insurance carrier Travelers Casualty.

Thereafter, effective August 1, 2008, claimant is entitled to a permanent partial general disability award of 78 percent, minus claimant's pre-existing functional impairment of 34 percent for a 44 percent permanent partial general disability. Claimant is entitled to weekly benefits at the maximum compensation rate of $529.00 for 2.29 weeks for a total award not to exceed $100,000.00, all of which is due and owing and ordered paid in one lump sum, minus amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of May, 2012.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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